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MEMORANDUM

IMPORTANT INFORMATION, PLEASE READ

TO: Field Staff and Leaders
FROM: CEA Legal
DATE January 7, 2022
RE: **Update - Continued School District Obligations in 2022 under the Healthy Families & Workplace Act (“HFWA”)**

Disclaimer: This publication is for informational purposes only and is not intended as a substitute for specific legal or other professional advice. If you have specific questions about your legal or contractual rights, contact your Colorado Education Association union representative or local leader. This guidance will be updated periodically based on new information and guidance, so please refer to this link for the most current information.

With the start of the new calendar year on January 1, 2022, employers have renewed obligations to provide employees with general paid leave and access to Public Health Emergency Leave (“PHEL”) under the HFWA.¹ This letter highlights who is covered by the HFWA and the key responsibilities of covered employers, as well as available employee remedies if their rights under the HFWA are violated.

QUESTION: Does the HFWA apply to school districts and/or charter schools?

ANSWER: As of January 1, 2022, all Colorado employers, regardless of size (including employers with 15 or less employees) are covered by the HFWA. This includes school districts and political subdivisions as stated in C.R.S. 8-13.3-402(5)(a) of the HFWA.

¹ Colorado Department of Labor and Employment Interpretive Notice & Formal Opinion # 6B & #6C.

QUESTION: Is there still a declared Public Health Emergency?

ANSWER: The HFWA defines a PHE as: an epidemic caused by a novel and highly fatal infectious agent, for which: (i) an emergency is declared by a federal, state, or local public health agency; or (ii) a disaster emergency is declared by the governor; or (b) a highly infectious illness or agent with epidemic or pandemic potential for which a disaster emergency is declared by the governor. Currently, there is a Federal PHE in effect that was issued by the Secretary of the U.S. Department of Health and Human Services on October 15, 2020, which is set to expire on January 16, 2022, and there is a current Public Health Order issued by the Colorado Department of Public Health & Environment on December 30, 2021, which will expire on February 1, 2022. This means that HFWA Public Health Emergency rules are still in effect. Also, given the prevalence of the Omicron variant, it appears likely that both federal and state orders will be extended.

QUESTION: Does my employer have to award me more leave in 2022?

ANSWER: The obligation to provide 1 hour of paid leave for every 30 hours of work up to 48 hours per year continues unless an employer provides more. Employees that have **already received** the 80 hours of PHEL, are not entitled to an additional 80 hours of PHEL/COVID-related leave but will keep or bank any unused PHEL. Any **newly hired** employees **are** entitled to a full 80-hour allotment of PHEL as long as, they are hired or have been hired during a Public Health Emergency. i.e., anytime between January 1, 2021, and the date of this memo. Therefore, **all** currently working employees should be entitled to 80 hours of PHEL, even recently hired employees.

QUESTION: Can I still use banked PHEL (or the 80 hours COVID-related leave) in 2022?

ANSWER: Yes. As of January 1, 2021, all eligible employees should have been provided 80 hours of PHEL or COVID-related leave. Employees can use their banked COVID-related leave “until four weeks after” all applicable public health emergencies end. Based on the date of issuance of the Federal declaration, employees have the right to access COVID-related leave until February 12, 2022. However, state, and local public health agencies may also have current public health declarations which could extend an employee’s right to COVID-related.

QUESTION: What does COVID-related mean?

ANSWER: HFWA lists 5 categories of covered reasons for which it is permissible to use PHEL or COVID-related leave.

- (1) needing to self-isolate due to either being diagnosed with, or having symptoms of, a communicable illness that is the cause of the PHE.
- (2) seeking a diagnosis, treatment, or care of such an illness (including preventive care, such as a vaccination).
- (3) being excluded from work by a government health official, or by an employer, due to the employee having exposure to, or symptoms of, such an illness (whether or not they are actually diagnosed with the illness).
- (4) being unable to work due to a health condition that may increase susceptibility or risk of such an illness.
- (5) caring for a child or other family member in category (1), (2), or (3), or whose school, childcare provider, or other care provider is unavailable, closed, or providing remote instruction due to the emergency.

QUESTION: Can a School District ask or require an employee, to waive or give up their HFWA leave as a condition of employment?

ANSWER: No. Any agreement to waive or modify an employee's rights under the HFWA is void under section C.R.S. 8-13.3-418 of the Act. As previously stated, CBAs while permissible, cannot limit, diminish the amount, or otherwise effect the availability of paid leave or PHEL in a manner that conflicts with the HFWA.

QUESTION: What are the employee's rights if they are denied HFWA leave or the use of HFWA leave?

ANSWER: Unlawful acts under HFWA include denying paid leave that an employee has a right to take, as well as any threat or adverse action (which includes firing, demoting, reducing hours, suspending, disciplining, etc.) that is done to retaliate against, or interfere with, either (C.R.S. 8-13.3-402(10), -407):

- requesting or taking paid leave under HFWA or attempting to exercise other HFWA rights.
- informing another person about, or supporting their exercise of, their HFWA rights; or
- filing a HFWA complaint or cooperating in any investigation or other proceeding about HFWA rights.

HFWA prohibits retaliation against employees for asserting incorrect complaints or information, as long as the employee's belief was reasonable and in good faith. (C.R.S. 8-13.3-407(3)).

HFWA paid leave counts as "wages" under Colorado law (C.R.S. 8-13.3-402(8)). An employee denied paid leave can file a complaint with the Division for unpaid wages up to \$7,500.

An employee can instead of filing with the Division can file a lawsuit in court if they prefer, but only after sending the employer a written demand and giving the employer at least 14 days to respond. (C.R.S. 8-13.3-411(4).)

An employee can file a complaint for unlawful retaliation or interference with rights, either with the Division or (after sending the employer a written demand and giving the employer at least 14 days to respond) in court. If retaliation or interference is proven, the employer may be ordered to pay the employee any lost pay (for the leave and/or for a firing or other action that cost the employee any pay), reinstate the employee (if the violation ended the employee's job), and/or pay fines or penalties under Colorado statutes for non-compliance. (C.R.S. 8-13.3-407, -411.) While the Division investigates all claims of unpaid wages, it investigates only some retaliation claims -- but will inform any employees whose claim it doesn't investigate. (C.R.S. 8-13.3-407(4).)

QUESTION: Where can I find more information on this issue?

ANSWER: Colorado Department of Labor and Employment Interpretive Notice & Formal Opinion # 6B and #6C, located [here](#) and [here](#).

We have also attached an informational sample letter that you can distribute within your district. If you have any questions, please feel free to reach out to CEA legal at legal@coloradoea.org.